UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

1LT EHREN K. WATADA, Petitioner, vs. LT. COL. JOHN HEAD, Military Judge, Army Trial Judiciary, Fourth Judicial District; LT. GEN. CHARLES JACOBY, Convening Authority, Ft. Lewis, Washington; Respondents.	NO. PETITIONER'S EMERGENCY MOTION FOR A STAY OF COURT-MARTIAL PROCEEDINGS **Emergency Relief Requested:** **Stay of Court-Martial Trial Scheduled to Begin October 9, 2007** **Emergency Hearing Requested on: October 5, 2007**

I. INTRODUCTION

In this habeas corpus petition case, the Petitioner, an officer in the United States Army, is facing criminal charges at a court-martial trial scheduled to begin on October 9, 2007 at Ft. Lewis, Washington. Petitioner respectfully submits that the convening of this trial would violate the Double Jeopardy Clause of the Fifth Amendment. Petitioner was previously

CARNEY
BADLEY
SPELLMAN

LAW OFFICES
A PROFESSIONAL SERVICE CORPORATION
701 FIFTH AVENUE, #3600
SEATTLE, WA 98104-7010
FAX (206) 467-8215
TEL (206) 622-8020

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brought to trial on the same criminal charges in February of this year. After three days in trial and after the Government had rested, the Military Judge presiding over that trial declared a mistrial, over the objection of Petitioner Watada, and ordered that a second trial be held.

It is well-established that such action violates the Double Jeopardy Clause, unless the prosecution can establish that the reasons for declaring a mistrial were so compelling, and the lack of alternatives to a mistrial so clear, that it can be said that there was "manifest necessity" for aborting the trial against the defendant's wishes. *See,* e.g., *Arizona v. Washington*, 434 U.S. 497, 505 (1978).

A mistrial granted over the defendant's objection deprives the accused of his "valued right to have his trial completed by a particular tribunal." *Wade v. Hunter*, 336 U.S. 684, 689 (1949). Accordingly, in this situation "the prosecutor must shoulder the burden of justifying the mistrial if he is to avoid the double jeopardy bar. His burden is a heavy one." *Arizona v. Washington*, *supra*, 434 U.S. at 505. Petitioner respectfully submits that the Government cannot meet its burden in this case.

Petitioner is entitled to seek habeas corpus relief from this Court on his double jeopardy claim. *Stow v. Murashige*, 389 F.3d 880 (9th Cir. 2004) (affirming grant of habeas and prohibiting Hawaii state court from retrying petitioner). He has diligently sought review of his claim at all three levels of the military court system. He has presented his claim to the trial court, the Army Court of Criminal Appeals, and to the United States Court of Appeals for the Armed Forces. The first two courts have denied his requests for relief. As of the close of business (i.e., 5:00 p.m. EDT) on October 3, 2007, the Court of Appeals for the Armed Forces has not yet ruled upon either his application for a stay of the court-martial proceedings, or upon the merits of

CARNEY BADLEY SPELLMAN
LAW OFFICES
A PROFESSIONAL SERVICE CORPORATION
701 FIFTH AVENUE, #3600
SEATTLE, WA 98104-7010
FAX (206) 467-8215
TEL (206) 622-8020

his Double Jeopardy claim in his Writ Appeal Petition for Review of the Decision of the Army Court of Criminal Appeals.

Time is running out. The court-martial trial is scheduled to begin on October 9, 2007. Because Monday, October 8th is a judicial holiday, the last judicial day before the start of the court-martial trial is this Friday, October 5, 2007.

As will be discussed below, the rule in this Circuit (and in every other Circuit to address the issue) is that if a criminal defendant presents a colorable, non-frivolous claim that his upcoming trial is barred by the Double Jeopardy Clause, the federal courts must issue a stay preventing the trial from going forward, and that stay must be maintained until appellate review of the Double Jeopardy claim is completed. This rule is derived from the Supreme Court's decision in *Abney v. United States*, 431 U.S. 651 (1977). Petitioner submits that he easily meets this standard, and that consequently, he is entitled to the emergency stay which he seeks from this Court.

II.

SERVICE MEMBERS FACING COURT-MARTIAL ARE ENTITLED TO SEEK RELIEF BY WAY OF HABEAS CORPUS UNDER 28 U.S.C. § 2241. IT IS ERROR TO WAIT UNTIL AFTER A COURT-MARTIAL TRIAL HAS CONCLUDED BEFORE ACTING ON SUCH A HABEAS PETITION.

As the Supreme Court stated over thirty years ago:

> The federal courts may grant the writ "within their respective jurisdictions." 28 U.S.C. § 2241(a). While the Act speaks in terms of "a prisoner" (28 U.S.C. § 2241(c)), the term has been liberally construed to include members of the armed forces who have been unlawfully detained, restrained, or confined. [Citation]. The Act extends to those "in custody" under or by color of the authority of the United States." 28 U.S.C. § 2241.

Schlanger v. Seamans, 401 U.S. 487, 489 (1971).

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701 FIFTH AVENUE, #3600
SEATTLE, WA 98104-7010
FAX (206) 467-8215
TEL (206) 622-8020

Thus, it is well-established that "[f]or purposes of the federal habeas corpus statutes, members of the Armed Forces are in the custody of the United States government" and they "may challenge their custody by petitioning for a writ of habeas corpus in federal court under 28 U.S.C. § 2241." *Aguayo v. Harvey*, 476 F.3d 971, 975-76 (D.C.Cir. 2007). *Accord Alhassan v. Hagee*, 424 F.3d 518, 521-22 (7th Cir. 2005).

In *Parisi v. Davidson*, 405 U.S. 34 (1972), the Supreme Court held that a District Court should *not* have stayed its habeas proceedings pending the outcome of a trial of court-martial charges. The Court reversed and remanded with directions for the District Court to consider the service-member's habeas corpus petition. Like Petitioner Watada, the petitioner in *Parisi* had "reported to Fort Lewis [Washington]. He refused, however, to obey a military order to board a plane for" a theater of war (in that case Vietnam). *Id.* at 36. This resulted in his being charged with a military offense.

Parisi filed a § 2241 habeas corpus petition while his court-martial charge was pending. The District Court "entered an order deferring consideration of the habeas corpus petition until final determination of the criminal charge then pending in the military court system." *Id.* at 37. Parisi appealed, and the Ninth Circuit affirmed the District Court's order staying the habeas petition proceeding until after the court-martial proceeding had concluded. The Supreme Court *reversed* the Ninth Circuit, and held that the lower courts had erred by staying the habeas proceeding until the court-martial trial was over. Relying upon the doctrine of exhaustion of alternative remedies and the doctrine of comity between the federal civilian courts and the military courts, the Army argued that the District Court was correct to stay its habeas proceeding until the court-martial trial was over. But the Supreme Court explicitly disagreed: "We hold

CARNEY BADLEY SPELLMAN

LAW OFFICES
A PROFESSIONAL SERVICE CORPORATION
701 FIFTH AVENUE, #3600
SEATTLE, WA 98104-7010
FAX (206) 467-8215
TEL (206) 622-8020

today that neither of these doctrines required a stay of the habeas corpus proceedings in this case." *Id.* at 37. The Supreme Court held that the District Court needed to decide whether the court-martial charge against the petitioner was valid, and if it proved to be invalid then petitioner Parisi "should prevail in the habeas corpus proceeding and was entitled to his immediate release from the military." *Id.* at 46, n.15. In his concurring opinion Justice Douglas noted: "I agree with the Court's view that habeas corpus is an overriding remedy to test the jurisdiction of the military to try or to detain a person." *Parisi*, 405 U.S. at 46.

It is also settled law that 28 U.S.C. § 2241, not § 2254, is the proper statute under which to bring this habeas petition, because Lt. Watada is not "under sentence" of a federal court. In *Stow v. Murashige*, *supra*, in an analogous situation where an accused was facing a retrial on criminal charges in a state court, the Ninth Circuit Court of Appeals stated:

> [W]e hold that Stow's habeas petition is properly considered under 28 U.S.C. § 2241, not 2254, because at the time Stow filed his petition he was not "in custody *pursuant to the judgment* of a state court."

Stow, *supra*, 389 F.3d at 882 (emphasis added).

> [W]e join four of our sister circuits in holding that Stow's habeas petition which raised a double jeopardy challenge to his pending retrial is properly treated under § 2241.

Stow, 389 F.3d at 885. Here, as in *Stow*, habeas relief is properly sought pursuant to § 2241.

III.

THE AEDPA STANDARDS ARE NOT APPLICABLE TO § 2241 HABEAS CORPUS PROCEEDINGS.

In 1996, Congress enacted the Antiterrorism and Effective Death Penalty Act (AEDPA) which placed numerous new restrictions on the ability of the District Courts to entertain, and to

CARNEY BADLEY SPELLMAN
LAW OFFICES
A PROFESSIONAL SERVICE CORPORATION
701 FIFTH AVENUE, #3600
SEATTLE, WA 98104-7010
FAX (206) 467-8215
TEL (206) 622-8020

grant, habeas corpus petitions. However, the AEDPA does not apply to § 2241 habeas corpus proceedings. It applies only to habeas proceedings brought pursuant to 28 U.S.C. § § 2254 and 2255. *See INS v. St. Cyr*, 533 U.S. 289, 305 n.25 (2001) (the "text [of § 2241] remained undisturbed by . . . AEDPA"). In a § 2241 habeas proceeding, the federal courts "do not apply the heightened standards imposed by the Antiterrorism and Effective Death Penalty Act of 1996 . . ." *Stow v. Murashige*, *supra*, 389 F.3d at 885-86. "Thus, to obtain habeas relief, [the petitioner] need only show that a retrial would violate his right against double jeopardy." *Id.* at 882. He need not show that the military judge's denial of his double jeopardy dismissal motion was clearly contrary to, or an unreasonable application of, clearly established Supreme Court precedent. *Id.* at 882-83.

The legal conclusion of whether a second trial is barred by the Double Jeopardy Clause is a question of law, which is reviewed *de novo*. As the Ninth Circuit held in *Stow*:

> Stow is not required to satisfy the demanding standards of AEDPA embodied in § 2254 to obtain habeas relief. That is, we can affirm the district court's judgment [granting a writ of habeas corpus] by concluding *de novo* that subjecting Stow to a retrial on the attempted second degree murder charges would violate the Fifth Amendment right against double jeopardy.

Stow, 389 F.3d at 888 (italics in original).

In *Stow*, the District Court decided to grant habeas relief and to prohibit the pending retrial, because holding the trial would violate double jeopardy. The Ninth Circuit affirmed this decision. Petitioner Watada is entitled to the same relief on the same type of claim.

IV.

BASIC DOUBLE JEOPARDY PRINCIPLES GOVERNING THIS CASE

CARNEY BADLEY SPELLMAN

LAW OFFICES
A PROFESSIONAL SERVICE CORPORATION
701 FIFTH AVENUE, #3600
SEATTLE, WA 98104-7010
FAX (206) 467-8215
TEL (206) 622-8020

In *Arizona v. Washington, supra,* the Court expressly noted that whenever "the first trial is not completed, a second prosecution may be grossly unfair." 434 U.S. at 503. A second trial increases financial and psychological burdens, "prolongs the period in which he is stigmatized by an unresolved accusation of wrongdoing, and may even enhance the risk that an innocent defendant may be convicted." *Id.* Therefore, "as a general rule, the prosecutor is entitled to one, and only one opportunity to require an accused to stand trial." *Id.* at 503-04.[1]

A trial judge's decision "to abort a criminal proceeding where jeopardy has attached is not one to be lightly undertaken, since the interest of the defendant in having his fate determined by the jury first impaneled is itself a weighty one…" *Illinois v. Somerville*, 410 U.S. 458, 471 (1973). "Nor will the lack of demonstrable additional prejudice preclude the defendant's invocation of the double jeopardy bar in the absence of some important countervailing interest of proper judicial administration." *Id.*

To avoid a double jeopardy bar to retrial, the prosecution must meet its "heavy burden" of justifying the declaration of mistrial:

> [T]he prosecutor must shoulder the burden of justifying the mistrial if he is to avoid the double jeopardy bar. His burden is a heavy one. The prosecution must demonstrate "manifest necessity" for any mistrial declared over the objection of the defendant.

Arizona v. Washington, supra, 434 U.S. at 505. The words "manifest necessity" aptly "characterize the magnitude of the prosecutor's burden." *Id.* The Supreme Court requires "a 'high degree' [of necessity] before concluding that a mistrial is appropriate." *Id.* at 506. Courts

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[1] "The underlying idea, one that is deeply ingrained in at least the Anglo-American system of jurisprudence, is that the State with all its resources and power should not be allowed to make repeated

CARNEY BADLEY SPELLMAN
LAW OFFICES
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701 FIFTH AVENUE, #3600
SEATTLE, WA 98104-7010
FAX (206) 467-8215
TEL (206) 622-8020

must be especially wary of the danger that the prosecution's request for a mistrial was designed to give it a chance to improve its chances of winning by marshalling better evidence the second time. *Id.* at 507 ("the prohibition against double jeopardy in this country was plainly intended to condemn this "abhorrent" practice"). The double jeopardy clause bars retrials where "bad faith conduct by judge or prosecutor threatens the harassment of an accused by successive prosecutions or declarations of a mistrial so as to afford the prosecution a more favorable opportunity to convict the defendant." *United States v. Dinitz*, 424 U.S. 600, 611 (1976).

The prohibition against double jeopardy unquestionably "forbids the prosecutor to use the first proceeding as a trial run of his case." *Arizona v. Washington*, *supra*, 434 U.S. at 508, n. 24. But such "extreme cases do not mark the limits of [the double jeopardy clause] guarantee." *Downum v. United States*, 372 U.S. 734, 736 (1963).

> The "particular tribunal" principle is implicated whenever a mistrial is declared over the defendant's objection and without regard to the presence or absence of governmental overreaching. If the "right to go to a particular tribunal is valued, it is because, independent of the threat of bad-faith conduct by judge or prosecutor, the defendant has a significant interest in the decision whether or not to take the case from the jury."

Arizona v. Washington, *supra*, 434 U.S. at 508, *quoting United States v. Jorn*, 400 U.S. 470, 485 (1971). The power to declare a mistrial and thus deprive the defendant of his right to have his case resolved by the particular jury at hand "ought to be used with the greatest caution, under urgent circumstances, and for very plain and obvious causes . . ." *United States v. Perez*, 22 U.S. 579 (1824).[2]

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attempts to convict an individual for an alleged offense . . ." *Green v. United States*, 355 U.S. 184, 187-188 (1957). This vital constitutional right is not to be given a narrow, grudging application. *Id.* at 198.

[2] The circumstances in *Wade v. Hunter*, *supra*, supported the conclusion that there were such urgent circumstances, and thus no double jeopardy violation was found based upon the facts of that case. The

CARNEY BADLEY SPELLMAN
LAW OFFICES
A PROFESSIONAL SERVICE CORPORATION
701 FIFTH AVENUE, #3600
SEATTLE, WA 98104-7010
FAX (206) 467-8215
TEL (206) 622-8020

V.

APPELLATE REVIEW OF DOUBLE JEOPARDY CLAIMS MUST BE CONDUCTED PRIOR TO THE TRIAL ALLEGED TO BE BARRED BY DOUBLE JEOPARDY.

A second trial on the same charges is the very evil the Double Jeopardy Clause protects against. It is for this very reason that the Supreme Court held in *Abney* that the denial of a motion to dismiss on double jeopardy grounds by a trial court is immediately appealable under the "collateral order" doctrine, notwithstanding the lack of the usual type of "finality" required before a judgment or an order may be appealed:

> Although it is true that a pretrial order denying a motion to dismiss an indictment on double jeopardy grounds lacks the finality traditionally considered indispensable to appellate review, ***we conclude that such orders fall within the "small class of cases" that Cohen [v. Beneficial Industrial Loan Corp., 337 U.S. 541 (1949)] has placed beyond the confines of the final-judgment rule.*** [FN omitted]. In the first place there can be no doubt that such orders constitute a complete, formal, and, in the trial court, final rejection of a criminal defendant's double jeopardy claim. There are simply no further steps to be taken in the [trial] [c]ourt to avoid the trial the defendant maintains is barred by the Fifth Amendment's guarantee. Hence *Cohen's* requirement of a fully consummated decision is satisfied.
>
> Moreover, the very nature of a double jeopardy claim is such that it is collateral to, and separable from, the principle issue at the accused's impending criminal trial, i.e., whether or not the accused is guilty of the offense charged. In arguing that the Double Jeopardy Clause of the Fifth Amendment bars his prosecution, the defendant makes no challenge whatsoever to the merits of the charge against him. . . . Rather, he is contesting the very authority of the Government to hale him into court to face trial on the charge against him. [Citations omitted]. The elements of that claim are completely independent of his guilt or innocence.

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strict requirement of manifest necessity was met by tactical military considerations. The first court-martial trial in *Wade* commenced in the midst of a military invasion of Germany, and it was aborted only when the military commanders concluded that the need to press forward with the advancing invasion made it impossible to continue with the trial. *Wade*, 336 U.S. at 691.

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701 FIFTH AVENUE, #3600
SEATTLE, WA 98104-7010
FAX (206) 467-8215
TEL (206) 622-8020

Abney v. United States, 431 U.S. at 659-660 (emphasis added).

The Supreme Court further recognized that unless the defendant could obtain immediate appellate review of the denial of a dismissal motion based on former jeopardy, the rights protected by the Double Jeopardy Clause would be rendered essentially meaningless. Without an avenue for immediate appellate relief, the defendant would be forced to endure the violation of his right not to be tried without being able to prevent the violation from occurring:

> ***Finally, the rights conferred on a criminal accused by the Double Jeopardy Clause would be significantly undermined if appellate review of double jeopardy claims were postponed until after conviction and sentence.*** To be sure, the Double Jeopardy Clause protects an individual against being twice convicted for the same crime, and that aspect of the right can be fully vindicated on an appeal following final judgment, as the Government suggests. However, ***this court has long recognized that the Double Jeopardy Clause protects an individual against more than being subjected to double punishments. It is a guarantee against being twice put to trial for the same offense.*** [FN and citations omitted]. Because of this focus on the "risk" of conviction, the guarantee against double jeopardy assures an individual that, among other things, he will not be forced, with certain exceptions, to endure the personal strain, public embarrassment, and expense of a criminal trial more than once for the same offense. . .
>
> [Citations omitted]. ***Obviously, these aspects of the guarantee's protections would be lost if the accused were forced to "run the gauntlet" a second time before an appeal could be taken***; even if the accused is acquitted, or, if convicted, has his conviction ultimately reversed on double jeopardy grounds, he has still been forced to endure a trial that the Double jeopardy Clause was designed to prohibit. [FN omitted]. ***Consequently, if a criminal defendant is to avoid exposure to double jeopardy and thereby enjoy the full protection of the Clause, his double jeopardy challenge to the indictment must be reviewable before that subsequent exposure occurs.***

Abney, *supra*, 431 U.S. at 660-62 (emphasis added).

Abney holds that a Double Jeopardy Clause challenge to the power of the government to subject the accused to a second trial "must be reviewable before that subsequent exposure

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A PROFESSIONAL SERVICE CORPORATION
701 FIFTH AVENUE, #3600
SEATTLE, WA 98104-7010
FAX (206) 467-8215
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occurs," 431 U.S. at 662. Therefore, Petitioner is entitled to obtain habeas corpus review of the denial of his pretrial motion to dismiss on double jeopardy clause before his second court-martial trial commences.

The right to review of the trial court's denial of a double jeopardy motion to dismiss serves to protect the constitutional right not to be tried more than once. Here, as in *Parisi*, it would be error to defer habeas review under § 2241 until after the conclusion of court-martial proceedings, for by that time the double jeopardy violation would have already occurred.

VI.

UNLESS THE DOUBLE JEOPARDY CLAIM IS FRIVOLOUS, THE ACCUSED IS ENTITLED TO A STAY PENDING APPELLATE REVIEW OF HIS CLAIM.

In *United States v. Claiborne,* 727 F.2d 842, 850 (9th cir. 1984) the Ninth Circuit held that normally a trial court *automatically* loses the power to conduct a trial if the accused appeals the denial of a claim that the trial is barred by double jeopardy:

> Ordinarily, if a defendant's interlocutory claim is considered immediately appealable under *Abney*, ***the district court loses its power to proceed*** from the time the defendant files its notice of appeal ***until the appeal is resolved.***

(Emphasis added.) *Accord United States v. Yellow Freight System, Inc.*, 637 F.2d 1248, 1252 (9th Cir. 1980). This is the rule adopted by virtually every Circuit Court of Appeals to consider this issue. It is uniformly recognized that if a defendant is appealing the denial of any claim that he has "a right not to be tried," then the trial court is automatically divested of jurisdiction to conduct any further proceedings in the case.

This rule applies to *any* type of claim where the litigant is asserting a "right not to be tried," whether that right stems from the Double Jeopardy Clause, or from some other source

CARNEY BADLEY SPELLMAN
LAW OFFICES
A PROFESSIONAL SERVICE CORPORATION
701 FIFTH AVENUE, #3600
SEATTLE, WA 98104-7010
FAX (206) 467-8215
TEL (206) 622-8020

of an immunity from suit (such as judicial immunity, or qualified immunity). As the Ninth Circuit noted in *Claiborne*, this right to stop all trial court proceedings is ***especially*** clear in cases where the asserted right not to be tried is based on the Double Jeopardy clause. The Ninth Circuit has recognized that the "divestiture rule" – the rule that the trial court automatically loses all jurisdiction – "takes on added significance when applied to interlocutory *Abney*-type criminal appeals," because of the risk of putting the defendant through a trial that might later be deemed barred by Double Jeopardy:

> [A] defendant raising an *Abney* type claim – asserting a valid constitutional 'right not to be tried' – would be irreparably harmed if the trial court continued to proceed to trial prior to the disposition of the appeal.

Claiborne, supra, 727 F.2d at 850.

At the same time, if seeking review of the denial of a frivolous double jeopardy claim automatically caused a divestiture of trial court power to proceed with the trial, then criminal defendants would have a powerful incentive to file frivolous appeals raising Double Jeopardy claims. The solution, adopted by all the federal circuit courts to consider the issue, is to limit the automatic divestiture rule to non-frivolous appeals. As the Court held in *United States v. Leppo*, 634 F.2d 101, 105 (3rd Cir. 1981):

> [W]e hold that an appeal from the denial of a double jeopardy motion does not divest the district court of jurisdiction to proceed with trial, if the district court has found the motion to be frivolous and supported its conclusions by written findings. Rather, both the district court and court of appeals shall have jurisdiction to proceed. Thus the defendant is entitled ultimately to appellate review. ***Of course, in the absence of a finding that the motion is frivolous, the trial court must suspend its proceedings once a notice of appeal is filed.***

(Emphasis added.)

The Fifth Circuit adopted the same rule:

CARNEY BADLEY SPELLMAN

LAW OFFICES
A PROFESSIONAL SERVICE CORPORATION
701 FIFTH AVENUE, #3600
SEATTLE, WA 98104-7010
FAX (206) 467-8215
TEL (206) 622-8020

> If the claim is found to be frivolous, the filing of a notice of appeal by the ***defendant*** shall not divest the district court of jurisdiction over the case. ***If nonfrivolous, of course, the trial cannot proceed until a determination is made of the merits of an appeal.***

United States v. Dunbar, 611 F.2d 985, 988 (5th Cir.), *cert. denied*, 447 U.S. 926 (1980)(emphasis added).[3]

This is precisely the position advanced by Petitioner Watada's counsel in the trial court: "I had indicated my belief that, based on *Abney*, that stay is automatic, without having to request it. . ." ROT II at 186 (July 6, 2007); *See* JA, No. 18. The military trial judge *never* made any finding that Petitioner's double jeopardy claim was frivolous. Nonetheless, he refused to recognize that he was divested of jurisdiction to proceed when Petitioner initiated the process of seeking appellate review of the ruling by the Army Court of Criminal Appeals, and he also refused to stay the trial date himself.

Moreover, the Government's pleadings in the military courts have effectively conceded the non-frivolous nature of the issue. The Government has never suggested that Petitioner's claim is frivolous. Indeed, the Government would be hard pressed to do so since at the first trial Government Counsel opposed the military judge's action (setting aside the parties' Stipulation of Fact late in the trial) which then led to the declaration of a mistrial. Moreover, the fact that the Army Court of Criminal Appeals initially issued a stay of the court-martial trial on May 18, 2007 (which it later dissolved on June 29, 2007), in order to give itself time to examine the merits of the double jeopardy issue, demonstrates that

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[3] *Accord Williams v. Brooks*, 996 F.2d 728 (9th Cir. 1993)("A number of circuits have addressed the precise issue on this appeal and have uniformly held that the filing of a non-frivolous notice of interlocutory appeal following a district court's denial of a defendant's immunity defense divests the district court of jurisdiction to proceed against him").

CARNEY
BADLEY
SPELLMAN

LAW OFFICES
A PROFESSIONAL SERVICE CORPORATION
701 FIFTH AVENUE, #3600
SEATTLE, WA 98104-7010
FAX (206) 467-8215
TEL (206) 622-8020

Petitioner's claim was not viewed as frivolous by that Court.

In the present case, Petitioner has sought relief by way of a petition for a writ of habeas corpus and seeks a stay of the court-martial proceedings in order to preserve the *status quo*, so as not to render this habeas corpus proceeding meaningless. Under the rule of *Claiborne*, he is entitled to such a stay unless his claim is frivolous. It is not. Here, as in *Stow*, this Court should prohibit the pending retrial from going forward.[4]

VII.

PETITIONER'S CLAIM IS MERITORIOUS, AND THUS HE IS ENTITLED TO A STAY.

The following brief summary of the facts and circumstances demonstrate the seriousness of Petitioner's double jeopardy claim.

A. FACTS

Petitioner's court-martial trial began on February 5, 2007. The military judge was apprised that on January 26, 2007, the parties had entered into a Stipulation of Fact and a Pretrial Agreement based upon that Stipulation. He reviewed the stipulation and conducted a lengthy colloquy on the record. ROT, *Transcript* 2/5/07, at pp. 126-149.

Petitioner Watada acknowledged that: he understood the Pretrial Agreement; he wanted

[4] This case does not present any of the federalism concerns for comity between federal and state courts that are present when a federal court is asked to stay a scheduled state court trial. As the *Stow* case illustrates, the federal habeas courts have not hesitated to prohibit state court retrials when such a trial would violate double jeopardy. *See also Mannes v. Gillespie*, 967 F.2d 1310, 1312 (9th Cir. 1992), *cert.* denied, 506 U.S. 1048 (1993)("Because full vindication of the right necessarily requires intervention before trial, federal courts will entertain *pretrial* habeas petitions that raise a colorable claim of double jeopardy"). *Accord Wilson v. Czerniak*, 355 F.3d 1151, 1157 (9th Cir. 2004) ("double jeopardy claims presented an exception to the general rule requiring federal courts to abstain from interference with state court proceedings"); *Schillaci v. Peyton*, 328 F.Supp.2d 1103, 1105-06 (D. Hawaii 2004)("the court agrees ... Petitioner will incur irreparable injury if the state proceedings are

CARNEY BADLEY SPELLMAN

LAW OFFICES
A PROFESSIONAL SERVICE CORPORATION
701 FIFTH AVENUE, #3600
SEATTLE, WA 98104-7010
FAX (206) 467-8215
TEL (206) 622-8020

to enter into it; he understood that in exchange for dismissal of Specifications 2 and 3 of Charge II he was agreeing to enter into a Stipulation of Fact; he understood the Stipulation could be used against him by the members either to find him guilty or to determine any sentence they might impose; and that an appellate court could also use it against him. *Id.* at 143-48. Petitioner stated that he was freely entering into the Agreement because he wanted to, and that he had no doubts. *Id.* at 147-149.

The judge also discussed with Petitioner the fact that the Agreement could be cancelled if he brought up something "inconsistent" with the facts he had stipulated to:

> MJ: And the last way this can be cancelled is if I refuse to accept the Stipulation of Fact. How that can happen is ***if you bring up something or your counsel bring up something inconsistent with what you've stipulated to as the uncontradicted facts*** in this case. Do you understand that?
>
> ACC: Yes, sir.
>
> MJ: ***That if the stipulation says, "Red," and you come in and say, "Blue," I'll have to reopen*** what we talked about earlier, ***and kind of make sure*** those – that we're still on the same sheet of music here about whether ***this is an accurate stipulation of fact.*** Do you understand that?
>
> ACC: I understand, sir.

Id. at 148 (emphasis added). The judge then admitted the Stipulation of Fact (Prosecution Exhibit 4) into evidence without objection. *Id.* He expressly found that the Petitioner understood the ramifications of both the Pretrial Agreement and Stipulation of Fact, and he accepted both.

On February 6, 2007, counsel for the parties gave their opening statements. The Government then proceeded to call its three witnesses. At 15:43 on February 6, 2007, the Government rested its case. *Id.* at 353.

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not enjoined."). Consequently, a federal court should have even *less* hesitation to stay a *federal*

CARNEY BADLEY SPELLMAN

LAW OFFICES
A PROFESSIONAL SERVICE CORPORATION
701 FIFTH AVENUE, #3600
SEATTLE, WA 98104-7010
FAX (206) 467-8215
TEL (206) 622-8020

When trial resumed on February 7, 2007, the military judge announced that he had noticed what he felt was a "conflict" between the Stipulation of Fact and an instruction proposed by defense counsel. A lengthy discussion ensued among the military judge, Government Trial Counsel, Civilian Defense Counsel, and Petitioner. This colloquy is reported at pp. 354-372 of the Transcript.

> MJ: I'm going to reopen the inquiry into the Stipulation of Fact, as a potential issue of mistake of fact has been raised by a proposed instruction by the defense, which has been marked as Appellate Exhibit XXXXV.

Id. at 354. Defense counsel objected to reopening that inquiry and stated there was no justification or legal basis to do so. *Id.* The judge never explained how there could be a conflict between a statement of the law contained in a proposed jury instruction, and a statement of fact contained in a Stipulation of Fact.

The military judge further stated that if he threw out the Stipulation, then the Government would "have no evidence" and therefore "a mistrial would be in order. And I would set a new trial date . . . ***That's what will happen***," the judge announced. *Id.* at 358-59 (emphasis added).

The judge then questioned Petitioner, who candidly acknowledged that he did not agree with a pretrial legal ruling that the judge had made. Petitioner believed that he had a defense to the charge of missing movement by design, based upon international law, because he believed that under the law the war in Iraq was illegal. The military judge believed that since Lt. Watada had stated that he disagreed with the judge's legal ruling precluding such a defense, that he had made a factual statement that was inconsistent with the Stipulation of Fact (which said absolutely nothing about any legal defense based upon international law).

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criminal trial which would violate double jeopardy.

CARNEY BADLEY SPELLMAN
LAW OFFICES
A PROFESSIONAL SERVICE CORPORATION
701 FIFTH AVENUE, #3600
SEATTLE, WA 98104-7010
FAX (206) 467-8215
TEL (206) 622-8020

The judge labored mightily to persuade Government Trial Counsel that the Stipulation of Fact was defective and should be set aside by the Court, but Government Trial Counsel refused to agree with him. The judge asked the Government if the accused had not "set up matters" inconsistent with the Stipulation of Fact, but counsel for the Government responded that he did not think so:

> MJ: Did he [Lt. Watada] not – ***has he not set up matters inconsistent with*** – he believes he has a defense to what he has stipulated to in a confessional stipulation. Whether it is a valid defense or not, government, isn't the point.
>
> TC: ***Your Honor, I don't see it.*** I mean, the subjective beliefs of the accused and that he has a defense are irrelevant.

Id. at 366 (emphasis added).

Defense Counsel also disagreed with the judge and tried to explain why the defendant's persistence in asserting a belief that he had a valid legal defense was *not* inconsistent with his stipulation as to various facts (*inter alia*, that he did not get on the plane for Iraq when ordered to do so).

> CC: ...***This is a stipulation; it's not a guilty plea.*** It's a stipulation of facts. That is to be judged differently. ***The impact or the effect of the stipulation, the parties can disagree about.*** And we apparently do disagree, but Lieutenant Watada's pleading not guilty. He's always made that clear. And yet, he is willing to plead to the facts which he understood could be sufficient on which to find him guilty, as you instructed. He knows that based upon the legal rulings and determinations the court makes. But he still maintains, notwithstanding those rulings, that he is entitled to plead not guilty for the reasons that he has stated to you.

Id. at 367 (emphasis added).

The judge asked counsel for the Government if he understood the Court's problem and he candidly said he did not:

> MJ: Do you understand my problem, government, with this?

CARNEY BADLEY SPELLMAN
LAW OFFICES
A PROFESSIONAL SERVICE CORPORATION
701 FIFTH AVENUE, #3600
SEATTLE, WA 98104-7010
FAX (206) 467-8215
TEL (206) 622-8020

TC: Frankly, Your Honor, no.

Id. at 368.

After vainly trying one more time to get counsel for the Government to agree with him, the Court again stated that it was contemplating declaring a mistrial:

> MJ: At this point I'm thinking we're going to have to reset a new trial date and those other charges will come back. Why don't we take 15 minutes…And when we come back, I'll make my ruling.

Id. at 369.

When court reconvened, the military judge again tried to persuade both counsel to agree with him, but neither would. *Id.* at 370-71. When Government Counsel reiterated that he agreed with Defense Counsel, the Court simply announced that it was rejecting the Stipulation of Fact, and asked the Government if it wanted to move for a mistrial:

> TC: Your Honor, I don't know what else to say other than what's already been said. ***The parties agree about the contents of the stipulation – the parties agree that it is a stipulation of fact.***
>
> MJ: That's not the issue. ***At this point I'm reconsidering Prosecution Exhibit 4 and rejecting the stipulation of fact.*** It's now Prosecution Exhibit 4 for identification, as the government has closed its case. ***Government, do you wish to reopen your case, or*** do you wish, as we now have a material breach of the pretrial agreement, ***do you wish to request a mistrial because at this point we don't have evidence on every element?***

Id. at 371 (emphasis added). Trial Counsel then asked for another recess, and that request was granted. *Id.* at 372.

When Court reconvened again, the judge asked defense counsel if the accused wished to withdraw from the Stipulation of Fact, and defense counsel stated he did not. *Id.* at 373. The Court again asked if the Government wished to move for a mistrial, and this time the

CARNEY
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SPELLMAN

LAW OFFICES
A PROFESSIONAL SERVICE CORPORATION
701 FIFTH AVENUE, #3600
SEATTLE, WA 98104-7010
FAX (206) 467-8215
TEL (206) 622-8020

Government acceded to the Court's request and made a mistrial motion:

> MJ: Government, what is your druthers? At this point, ***I certainly entertain a motion for a mistrial and I'll set a new trial date***. At this point, I believe there is a breach of the pretrial agreement, which would allow the government to resurrect the additional charges that were dismissed because we have not reach [sic] the determination point, as required, for a dismissal with prejudice. . . . What we're left with is I can instruct the members, if the government wishes to go forward. I know the government does not have all of their witnesses that they would have called for the other offenses. ***So government, what's your choice***?
>
> TC: Your, Honor, ***at this point, the Government moves for mistrial.***

Id. at 373-74 (emphasis added).

The Court then asked for the defense position, and the defense stated its opposition to declaration of a mistrial. Without considering ***any*** other alternatives, the Court then *instantly* declared a mistrial and proceeded to set a new trial date:

> MJ: Defense, do you want to be heard?
>
> CC: Yes. ***We would oppose the motion.***
>
> MJ: Counsel, I have the week of 19 March available.
>
> CC: Can we first determine, are you declaring a mistrial?
>
> MJ: ***I'm going to declare a mistrial.***

Id. at 374 (emphasis added).

B. LACK OF MANIFEST NECESSITY

The military judge's confusion about the significance of the Stipulation of Fact, and his refusal to contemplate the views of counsel for both parties (as well as the Petitioner), caused him to erroneously throw out the Stipulation of Fact after the Government had rested. The judge's erroneous belief that he had to reject the stipulation was predicated upon two erroneous

CARNEY BADLEY SPELLMAN

LAW OFFICES
A PROFESSIONAL SERVICE CORPORATION
701 FIFTH AVENUE, #3600
SEATTLE, WA 98104-7010
FAX (206) 467-8215
TEL (206) 622-8020

assumptions.

First, he mistakenly concluded that the Stipulation of Fact constituted a "confessional statement," i.e. a statement admitting all the elements of the offense of missing movement. However, the stipulation contained no admission of the element that the movement was "required in the course of duty," and in fact Lt. Watada had made it abundantly clear that he believed that under international law he was not required to make the troop movement. Since it was not a confessional statement, there was no need to conduct any inquiry at all to determine whether Petitioner knew what he was doing, and thus no need to declare a mistrial based on the erroneous perception that the accused was in some way contradicting a confessional statement of fact by proposing a jury instruction.

Second, the military judge mistakenly believed that since Petitioner's counsel had requested the giving of a jury instruction on a point of ***law*** (the defense of mistake of fact), that Lt. Watada had somehow made a representation that was inconsistent with the ***facts*** that he had stipulated to. But it is self-evident that there can be no inconsistency between an assertion of fact contained in a Stipulation and an assertion of law contained in *a proposed jury instruction* submitted by the defense. A proposed jury instruction is not testimony. A proposed jury instruction is simply one party's assertion of what the governing law is. Since an assertion as to what the law is can never be inconsistent with an assertion of fact, ***no*** inconsistency triggering ***any*** duty to inquire can ***ever*** be triggered. Moreover, in the instant case, as defense counsel pointed out to the military judge, the defense fully expected that the judge would decline to give the proposed instruction. *Transcript,* at 356-57. Both of trial judge's mistakes led him to reject the stipulation without any cause for doing so, and led him to make the flawed and completely

CARNEY
BADLEY
SPELLMAN

LAW OFFICES
A PROFESSIONAL SERVICE CORPORATION
701 FIFTH AVENUE, #3600
SEATTLE, WA 98104-7010
FAX (206) 467-8215
TEL (206) 622-8020

unnecessary declaration of mistrial.

The military judge clung to his belief that Petitioner had somehow contradicted the facts set forth in the stipulation because Petitioner and his counsel refused to agree with the judge's legal conclusion that he could not litigate the legality of the war in Iraq. And yet, counsel for both sides assured the judge that there was ***no*** problem with the stipulation of fact. Counsel for the accused told the military judge, *"there is nothing in the stipulation that is contradicted by the instruction that we're offering to you." Transcript*, at 356.[5]

C. FAILURE TO CONSIDER ANY ALTERNATIVE TO A MISTRIAL

"[T]he prosecutor must shoulder the burden of justifying the mistrial if he is to avoid the double jeopardy bar. His burden is a heavy one." *Arizona v. Washington*, 434 U.S. 497, 505, 98 S.Ct. 824, 54 L.Ed.2d 717 (1978). Where there *are* other alternatives to declaration of a mistrial, the declaration of mistrial is erroneous and double jeopardy bars a retrial. In the instant case, even assuming for the sake of argument that the military judge was correct in his determination that he had to reject the Stipulation of Fact and set aside the Pretrial Agreement, he gave absolutely no thought to any other alternative way of dealing with the situation other than declaration of a mistrial.

The judge recognized that once the stipulation was set aside, the government would have no evidence on several of the charges because it would be caught without many of the witnesses it needed to establish the offenses. The judge did not even pause, however, to consider the possibility of recessing the trial, and resuming it at a later date when the

[5] When the judge pressed counsel for the Government to agree with him, counsel replied simply, "*Government tends to agree that there is no contradiction in the stipulation.*" *Id.* The judge asked

CARNEY BADLEY SPELLMAN

LAW OFFICES
A PROFESSIONAL SERVICE CORPORATION
701 FIFTH AVENUE, #3600
SEATTLE, WA 98104-7010
FAX (206) 467-8215
TEL (206) 622-8020

government would have its witnesses available to testify. Without asking either counsel if there were any alternatives to a mistrial to be considered, the judge simply announced that the court's calendar was open on the week of March 19, 2007. *Transcript*, at 374.

This failure to recognize the viable alternative of a continuance is particularly egregious since the judge actually asked the Government if its witnesses would be available the week of March 19, 2007, and the Government said yes. *Transcript*, at 375. Thus, there was no consideration of the possibility of simply recessing and resuming the trial during the week of March 19, 2007. Indeed, the only reason the judge focused on the week of March 19th was that that week was open on the court's calendar.

It is entirely possible that the Government might have been able to get their witnesses into court much faster than that. Perhaps only a one or two week continuance would have been required. The answer will never be known because in his rush to simply declare a mistrial, the military judge never explored this possibility at all.

Although Rule of Courts-Martial 915(a) specifically directs a military judge to consider the possibility of declaring only a *partial* mistrial, in this case the military judge never did this. The possibility of declaring a mistrial only as to the charges which had been covered by the Stipulation and the Pretrial Agreement was never discussed or considered.

Similarly, the judge simply assumed that ***no*** part of the stipulation could be salvaged. The Stipulation of Fact was entered into in exchange for the Pretrial Agreement, which called for dismissal of two of the four Conduct Unbecoming an Officer specifications. The military judge simply assumed that if the Stipulation pertaining to the missing movement charge was rejected,

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again if he did not see the inconsistent positions that the accused was taking, but counsel replied

CARNEY
BADLEY
SPELLMAN

LAW OFFICES
A PROFESSIONAL SERVICE CORPORATION
701 FIFTH AVENUE, #3600
SEATTLE, WA 98104-7010
FAX (206) 467-8215
TEL (206) 622-8020

that the parties would not want to adhere to any other part of their agreement. It is entirely possible that notwithstanding invalidation of that part of the stipulation dealing with the missing movement charge, the Government and the defense might have been able to reconfigure the Stipulation in a manner that might have satisfied their purposes and satisfied the military judge that the outcome was just. Thus, there was never ***any*** consideration given as to whether it was truly necessary to declare a mistrial.

In sum, not only was there no "high degree" of necessity for declaration of mistrial, *Arizona v. Washington*, *supra*, 434 U.S. at 506, there was absolutely ***no*** necessity at all. Petitioner's Civilian Counsel put the judge on notice of the double jeopardy issue, arguing that there was no justification for a mistrial and that a subsequent retrial might be barred if one was declared over the defendant's objection. *Id.* at 359. Nonetheless, undeterred, the military judge ignored the warning, and went ahead and declared the mistrial.

VIII. CONCLUSION

This is a remarkably clear case of an egregious violation of the double jeopardy clause. At the very least, Petitioner has raised a serious claim which is certainly not frivolous. Accordingly, under the rule of *Claiborne*, Petitioner is entitled to a stay of the upcoming court-martial trial. For these reasons Petitioner asks this Court to grant this emergency motion for a stay, and to issue an order forthwith prohibiting the respondents from proceeding with the scheduled court-martial trial, with this stay to remain in effect until the conclusion of this habeas corpus proceeding.

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simply, "Your Honor, I don't see it." *Id.* at 366-67.

CARNEY BADLEY SPELLMAN

LAW OFFICES
A PROFESSIONAL SERVICE CORPORATION
701 FIFTH AVENUE, #3600
SEATTLE, WA 98104-7010
FAX (206) 467-8215
TEL (206) 622-8020

DATED this 3rd day of October, 2007.

/s/ James E. Lobsenz
WSBA No. 8787
Kenneth S. Kagan
WSBA No. 12983
Attorneys for Petitioner

CARNEY BADLEY SPELLMAN, P.S.
701 Fifth Avenue, Suite 3600
Seattle, WA 98104
Phone: (206) 622-8020
Facsimile: (206) 622-8983
lobsenz@carneylaw.com
Kagan@carneylaw.com